

The Honorable Karen A. Overstreet  
Chapter 11  
Stalking Horse/Bid Procedures Hearing Date  
and Time: December 17, 2010 at 9:30 a.m.  
Response Due: December 15, 2010

Sale Hearing Date: to be determined  
Sale Hearing Time: to be determined  
Response Due: to be determined  
Hearing Location: 700 Stewart St., Rm. 7206

**UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

In re  
FREDERICK D. BERG,  
Debtor

Lead Case No. 10-18668-KAO  
(Administratively Consolidated with  
Case Nos. 10-23755-KAO, 10-23756-  
KAO, 10-23757-KAO, 10-23759-KAO,  
10-23761-KAO)

In re  
MERIDIAN TRANSPORTATION RESOURCES, LLC,  
Debtor

**MOTION FOR APPROVAL OF:**

In re  
MERIDIAN TRANSPORTATION RESOURCES  
(CALIFORNIA), LLC,  
Debtor

1. SALE, PURSUANT TO AN  
AUCTION, OF  
SUBSTANTIALLY ALL OF  
DEBTORS' ASSETS AND  
BUSINESS FREE AND CLEAR  
OF LIENS;

In re  
MERIDIAN TRANSPORTATION RESOURCES  
(CANADA), Ltd.,  
Debtor

2. BIDDING, NOTICE AND SALE  
PROCEDURES; and

In re  
MTR LEASING, LLC,  
Debtor

3. ADDITIONAL RELIEF

In re  
GEOGENIUS, LLC,  
Debtor

MOTION FOR APPROVAL OF: 1. SALE...OF SUBSTANTIALLY ALL OF  
DEBTORS' ASSETS ...FREE AND CLEAR OF LIENS; 2. BIDDING,  
NOTICE AND SALE PROCEDURES; and 3. ADDITIONAL RELIEF - 1  
#777928 v1/ 43835-001

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Meridian Transportation Resources, LLC, a Washington limited liability company ("**MTR**"), Meridian Transportation Resources (California), LLC, a California limited liability company ("**CA**"), Meridian Transportation Resources (Canada), Ltd., a federal corporation extraprovincially registered in British Columbia ("**LTD**"), MTR Leasing, LLC, a Washington limited liability company ("**Leasing**"), and Geogenius, LLC, a Washington limited liability company ("**Geogenius**"), the Debtors and Debtors In Possession (hereinafter collectively, "**MTR Western**" or the "**Debtors**"), through their counsel George S. Treperinas and Karr Tuttle Campbell, move the Court for approval of (i) sale of substantially all of Debtors' assets and business free and clear of all liens, claims, interests and encumbrances pursuant to Bankruptcy Code §363; (ii) bidding and notice procedures; (iii) assumption and assignment of certain of MTR Western's executory contracts; (iv) rejection and assumption of certain of MTR Western's contracts; and (iii) additional relief as described herein. This motion (the "**Sale Motion**") is supported by the Declarations of Diana K. Carey (the "**Carey Declaration**") and Eric D. Orse (the "**Orse Declaration**").

## **I. FACTUAL BACKGROUND**

1. Frederick Darren Berg, the sole-shareholder of all of the MTR Western entities, filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code (the "**Code**") in the United States Bankruptcy Court for the Western District of Washington at Seattle (the "**Bankruptcy Court**") on July 27, 2010 under the Lead Bankruptcy Case No. 10-10528-KAO (the "**Berg Case**").

1           2.       Diana K. Carey (the “*Trustee*”) was appointed Chapter 11 trustee of the Berg Case on  
2 August 19, 2010, and a Bankruptcy Court order was entered thereafter ratifying her control of the  
3 MTR Western entities, which she continues to manage and control.  
4

5           3.       Each of the MTR Western entities filed voluntary petitions (collectively, the  
6 “*Reorganization Cases*”) under Chapter 11 of the Code on November 15, 2010 (the “*Petition*  
7 *Date*”).  
8

9           4.       The MTR Western entities operate a premium motor coach fleet for charter in the  
10 western United States and western Canadian Provinces with central operations in Seattle,  
11 Washington. The MTR Western entities continue to operate as debtors-in-possession pursuant to  
12 sections 1107(a) and 1108 of the Code. No trustee or examiner has yet been appointed in the  
13 Reorganization Cases, although a motion to appoint the Trustee as the trustee of each of the MTR  
14 Western entities is pending for hearing on December 3, 2010.  
15

16           5.       Prior to Berg’s bankruptcy filing, Berg engaged in various activities that were  
17 detrimental to the continued success of the MTR Western Entities and their business, which activities  
18 have been well documented in the Berg Case and the related “*Meridian Fund Cases*<sup>1</sup>.”  
19

20           6.       In order to maximize the value of the assets of the Berg bankruptcy estate, the Trustee  
21 has sought to maintain the going-concern value of the MTR Western entities’ business. The Trustee  
22 has obtained offers from numerous parties for the MTR Western entities and believes that the best  
23 prospect for successfully selling such entities is through the bankruptcy process as proposed in this  
24 Motion.  
25

26  
27  
28           <sup>1</sup> The Meridian Fund cases have been consolidated for administration under Case No. 10-17952 in the above-captioned Court.

1           7.       The primary assets of MTR Western are the motor coaches (the “**Motor Coaches**”)  
2 (titled primarily under Leasing). The Motor Coaches are largely financed by Wells Fargo Equipment  
3 Financing Corp. (“**Wells**”) and ABC Companies, Inc. and its affiliates (collectively, “**ABC**”); although  
4 some of the Motor Coaches are subject to sale lease backs with an option to repurchase. Since prior  
5 to and since the filing of the Berg Case, the MTR Western entities have had serious issues keeping  
6 current with their obligations to Wells and ABC.  
7

8           8.       The debt service to Wells is approximately \$65,000 per month on an overall obligation  
9 of \$3 mil.  
10

11           9.       The lease obligations and debt service of the MTR Western entities to ABC is  
12 approximately \$224,000 per month. The overall obligation of to ABC is approximately \$7.7 mil.  
13 (which includes the amount necessary to exercise an option to purchase 20 Motor Coaches which  
14 option has significant value to the MTR Western entities’ estates).  
15

16           10.      The MTR Western entities have real property leases in Los Angeles, San Francisco,  
17 Portland, Federal Way, Seattle, Calgary, and Delta, B.C. The total monthly obligation is  
18 approximately \$100,000.  
19

20           11.      A prompt reorganization or orderly sale of the assets is required in order to maintain  
21 the value of the MTR Western entities and their business, for the benefit of their creditors, employees,  
22 and customers.  
23

24           12.      These bankruptcy filings were the only sure way to protect and perhaps even increase  
25 the value of MTR Western. Without filing for bankruptcy and the post-petition financing approved  
26 by this Court, it is unlikely that MTR Western could have survived without having to terminate all  
27 employees and close the business enterprise entirely.  
28

1           13.    **MTR Western Marketing Efforts.** Since appointment of the Trustee, MTR  
2 Western's management team, as well as the Trustee and her financial advisor, Eric Orse ("**Orse**"),  
3 have worked exhaustively to identify and contact potential buyers, and to reassure customers and  
4 vendors that the MTR Western brand and related business enterprise will survive the challenges  
5 which came to light in conjunction with Berg's actions and inactions relating to the Meridian Funds  
6 and MTR Western, as well as after the bankruptcy filing. 16 interested parties were provided with a  
7 confidentiality and non-disclosure agreement ("**NDA**") and given a promotional package and access  
8 to further data about the Debtors  
9

10  
11           14.    The Trustee and Orse have been engaged in discussions with GTO, LLC,  
12 ("**Purchaser**") since a short time after the Trustee's appointment in the Berg Case and eventually  
13 reached agreement on the terms of an Asset Purchase Agreement (the "**APA**"), attached as Exhibit  
14 A. The APA provides that consideration for the Acquired Assets is a net cash purchase price to the  
15 Debtors of \$4.25million, together with an Earn-Out Payment of up to \$1 mil. over two years, based  
16 on the post-closing enterprise's operations, payment at closing of critical vendor claims of \$551,182  
17 and the assumption or payment of the underlying debt against the Motor Coaches of (approximately  
18 \$10.7 mil.); as further described below (collectively the "**Purchase Price**").  
19

20  
21           15.    Based on the Debtors' prepetition sale efforts, and contacts with potentially  
22 interested parties, the Debtors believe that the Purchase Price is fair and reasonable and is the  
23 highest and best offer received to date. In order to be in a position to sell MTR Western as a going  
24 concern, it was necessary to obtain a commitment for up to \$1,300,000 in post-petition financing of  
25 their operations, which the Buyer has been willing to extend (and a hearing to consider further  
26 approval of this financing arrangement on more than an interim basis is scheduled to be heard on  
27  
28

December 3, 2010). Current financial and cash flow issues dictate that a sale be consummated quickly to ensure the value of the Debtors' assets is preserved. Indeed, absent an expeditious sale or an immediate substantial increase in off-season business, the value of the Debtors as a going concern will be placed in severe jeopardy and the Debtors may well be forced to liquidate.

## II. SUMMARY OF TERMS OF PROPOSED SALE

The following is a summary of some of the material terms of the proposed sale ("*Proposed Asset Sale*") as set forth in the APA:<sup>2</sup>

1. **Assets to be Purchased.** The assets to be purchased (the "*Acquired Assets*") are defined in the APA, but include substantially all of the Debtors' assets including without limitation all of their rights, title, privileges, benefits and interests in and to, and can be summarized as follows:

(a) Inventory. All inventories of parts or other equipment, which are used or held for use by Seller, together with all rights of Seller against suppliers of such inventories;

(b) Tangible Personal Property. Certain furniture, fixtures, equipment, parts, machinery and other tangible personal property (other than Inventory) of Seller, including the tangible personal property such as all computers and software, and personal property related thereto, including all computer racks, cables and racks listed on Schedule 2.1(b);

(c) Personal Property Leases. The leases or subleases of Tangible Personal Property as to which Seller is the lessee or sublessee, together with any options to purchase the underlying property, but only if such leases or subleases are designated by Purchaser as Assumed Executory Contracts;

(d) Client List. Seller's current and prospective Customer lists;

(e) Intangible Personal Property. All Intellectual Property of Seller (including Seller's goodwill therein) and all warranties, rights, privileges, claims, causes of action and options relating or pertaining to the Acquired Assets or the Seller's Business, including the name "MTR",

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<sup>2</sup> This description of the terms of the APA is intended solely to provide the Court and interested parties with an overview of the significant terms the APA. The Court and interested parties are respectfully referred to the APA for the complete terms of the Proposed Asset Sale. In the event of a conflict between the terms included in this overview and the APA contained herein and the APA, the APA shall govern. Capitalized terms not defined in this Motion have the meanings given in the APA.

1 the business processes and practices of Seller, together with any Intellectual Property which would  
2 be considered an Assumed Executory Contract;

3 (f) Permits. All licenses, permits, certificates, authorizations and approvals  
4 issued by any Governmental Authority, including applications therefor (collectively, "Permits");

5 (g) Books and Records. All books and records used or held for use in the  
6 conduct of the Business or otherwise relating to the Acquired Assets, other than the minute books,  
7 charter documents, stock transfer books and records, and corporate seal of Seller;

8 (h) Deposits. All prepaid assets and deposits, security deposits, deposits with  
9 creditors and other deposits of any kind whatsoever;

10 (i) Contracts. All Existing Contracts which are designated by Purchaser as  
11 Assumed Executory Contracts;

12 (j) Real Property Leases. The leases of real property as to which Seller is the  
13 lessee; but only if such leases are designated by Purchaser as Assumed Executory Contracts;

14 (k) Motor Coaches. The motor vehicles identified on Schedule 2.1(l) owned by  
15 Leasing; and

16 (l) Other Assets. The assets set forth on Schedule 2.1(m).

17 2. **Consideration**. The purchase price for the Acquired Assets shall consist of the  
18 Purchase Price, described above.

19 3. **Assumed Executory Contracts**. Pursuant to Section 2.2 of the APA, no later than  
20 23 days prior to the Auction, the Purchaser shall provide Debtors with written notice of which  
21 Existing Contracts it intends to assume as Assumed Executory Contracts at Closing. Upon receipt of  
22 Purchaser's written disclosure of the Assumed Executory Contracts, Debtors shall file a motion that  
23 such contracts be assumed and assigned by order of the Court on the date that the Court approves a  
24 final sale of the Acquired Assets to the Purchaser. Any such order assuming the Assumed  
25 Executory Contracts shall be conditioned upon Closing of the sale to a Successful Bidder desiring an  
26 assignment of the Assumed Executory Contracts.  
27  
28

1           4.     **Cure Costs.** As described in Section 2.2(b) of the APA, the amount determined to  
2 be necessary to cure the Debtors' pre-Closing obligations shall be paid at closing in order to allow  
3 the Assumed Executory Contracts to be assigned to the Purchaser. If the Debtors do not have the  
4 ability to pay the Cure Amounts, the Purchaser has the right to pay the Cure Amounts and deduct  
5 the amount of such payment(s) from the Purchase Price.  
6

7           5.     **Rejection of Contracts.** With respect to any Existing Contracts which are not  
8 Assumed Executory Contracts (the "***Excluded Contracts***") which the Purchaser informs the Debtors  
9 in writing it requires be rejected as a condition of the sale no later than 23 days prior to the Auction,  
10 Debtors shall file a motion for rejection of such contracts that such contracts be rejected by order of  
11 the Court on the date that the Court approves a final sale of the Acquired Assets to the Purchaser.  
12 Any such order rejecting Excluded Contracts shall be conditioned upon Closing of the sale to a  
13 Successful Bidder desiring the rejection of the Excluded Contracts.  
14  
15

16           6.     **Conditions.** Debtors and Purchaser's obligations to consummate the transactions  
17 contemplated in the APA are subject to satisfaction of the conditions set forth in Articles VII and  
18 VIII of the APA, respectively. Consummation of the sale under the APA is conditioned upon, *inter*  
19 *alia*, entry of the Bidding Procedures Order (being filed concurrently herewith) and Sale Order, as  
20 defined below in Section III. and attached hereto as Exhibit B.  
21

22           7.     **Higher and Better Offers.** The APA is subject to the submission by third parties of  
23 higher or better offers as set forth in the Bidding Procedures Order.  
24

### 25                           **III. PROPOSED SALE PROCEDURES**

#### 26           **(a) The Bidding Procedures and Break Up Fee**

27           The Debtors and Purchaser recognize that the sale of the Acquired Assets as contemplated  
28 by the APA is subject to Debtors' receipt of higher and better offers. Therefore, Debtors seek

1 authority to implement certain procedures to ensure that their bankruptcy estates will obtain the best  
2 return possible. The Debtors thus request that the Court enter a Bidding Procedures Order in the  
3 form being filed concurrently herewith, approving the following bidding procedures (the “**Bidding**  
4 **Procedures**”) to be employed with respect to the Proposed Asset Sale.

5 The Proposed Asset Sale is subject to competitive bidding as set forth herein and approval by  
6 the Court at a hearing under Sections 363 and 365 of the Bankruptcy Code (the “**Sale Hearing**”).  
7 The following alternative bid provisions and related bid protections are designed to compensate  
8 Purchaser for its efforts and agreements to date and the concomitant benefits conferred upon  
9 Debtors, and to facilitate a full and fair process designed to maximize the value of the Acquired  
10 Assets for the benefit of Debtors’ stakeholders:<sup>3</sup>

11  
12 **1. Designation of Stalking Horse Bidder.**

- 13 a. Debtors have designated the bid of Purchaser (“**Stalking Horse Bidder**”) as  
14 the “stalking horse” bid (“**Stalking Horse Bid**”). As the Stalking Horse  
15 Bidder, Purchaser shall, upon entry of the Bidding Procedures Order, be  
16 entitled to the Break-Up Fee (as defined below) and other standard stalking  
17 horse protections as discussed below. **For purposes of these procedures,**  
18 **the Stalking Horse Bidder’s deposit requirement is \$250,000, which the**  
19 **Debtors’ acknowledge they have received and such funds are currently**  
20 **on deposit** in an escrow account designated by Debtors (“**Escrow Account**”).  
21 b. The obligation of Purchaser to perform under the APA is conditioned on,  
22 among other things, the entry of the Bidding Procedures Order by the  
23 Bankruptcy Court approving the Bidding Procedures and the Break-Up Fee.

24 **2. Auction Process.**

- 25 a. Auction Date. The auction shall take place on the Business Day prior to the day  
26 scheduled for the hearing on the Sale Motion at the offices of Karr Tuttle Campbell,  
27 1201 Third Ave., #2900, Seattle, Washington 98101, counsel for the Debtors at 1:00  
28 p.m. PST, and noticed to all prospective bidders. To be eligible to participate in the

<sup>3</sup> Terms not otherwise defined in this Section III shall have the meanings ascribed to such terms in the Bidding Procedures. This summary of the Bidding Procedures terms is meant only as a summary of such terms and to the extent there is a conflict between this summary and the terms of the Bidding Procedures, the Bidding Procedures shall govern.

1 auction, authorized representatives for each Qualified Bidder must appear in person  
2 at this address.

- 3 b. Qualifications to Bid. Only qualified bidders (as described below) shall be allowed  
4 to participate in the auction. Purchaser shall be a Qualified Bidder for all  
5 purposes hereunder. To become a “**Qualified Bidder**,” each prospective bidder  
6 shall, on or before 5:00 p.m. PST on the Business Day that is Ten (10) Business Days  
7 prior to the day scheduled for the hearing on the Sale Motion deliver (i) a good faith  
8 deposit in the amount of \$250,000 in cash into the Escrow Account and (ii) a binding  
9 letter agreement to George S. Treperinas, Karr Tuttle Campbell, 1201 Third Ave.,  
#2900, Seattle, Washington 98101 (Email: [gtreperinas@karrtuttle.com](mailto:gtreperinas@karrtuttle.com) or  
[mmunhall@karrtuttle.com](mailto:mmunhall@karrtuttle.com); Fax: (206) 682-7100), counsel for the Debtors, which  
contains the following:

- 10 (1) **a binding offer to acquire the Acquired Assets for an amount**  
11 **that is at least \$375,000 more than the aggregate value of the**  
**Opening Bid** (as defined below) (“**Over Bid**”);
- 12 (2) evidence to the reasonably satisfaction of the Seller of such  
13 Qualified Bidder’s financial ability to (a) fully and timely perform  
14 if it is declared to be the Successful Bidder, and (b) provide  
15 adequate assurance of future performance of all contracts to be  
assigned and any post-closing investments into the Business;
- 16 (3) disclosure of any connections or agreements with Sellers and/or  
17 any officer, director or equity security holder of Sellers; and
- 18 (4) an agreement to accept and abide by the terms, conditions and  
19 procedures set forth herein.

20 If such bidder contemplates making a bid on terms different than those agreed to by  
21 Purchaser in the APA, such bidder shall submit with its letter agreement (a) a detailed  
22 description of the differences, and (b) a proposed form of asset purchase agreement marked  
23 to show the differences between its proposed asset purchase agreement and the APA;  
provided that a Qualified Bidder shall not be permitted to vary the terms of the APA in any  
24 way that could nullify, modify, impair or otherwise affect the requirements set forth in (1)  
through (4) above.

- 25 c. Counsel for the Debtors shall promptly provide copies of any bids that he receives to  
26 the Stalking Horse Bidder and to any Official Creditor Committees appointed in the  
27 Berg Case or in any of the Seller Entities’ respective bankruptcy cases. Any party in  
28 interest (including the Stalking Horse Bidder) shall have standing to challenge any  
prospective bidder’s compliance with these qualification requirements. Any dispute  
regarding a prospective bidder’s compliance with these qualification requirements  
shall be resolved by the Bankruptcy Court.

- d. The Stalking Horse Bid shall be considered the opening bid ("**Opening Bid**") at the Auction. For all purposes of these bidding procedures and the Auction contemplated herein, including, without, limitation, the determination of the Successful Bidder, the Opening Bid shall be valued at an amount equal to the sum of Four million Eight Hundred One Thousand One Hundred Eighty-Two Dollars (\$4,801,182) cash at closing (with \$551,182 initially earmarked for critical vendors and balance of cash to Seller Entities), together with the value attributed to Earn-Out Payment due to Seller Entities which will range from \$0 to \$1,000,000 (conditioned upon the post-closing earnings of the MTR Western enterprise as operated by the Purchaser as more specifically set forth in the APA), together with the assumption or payment at closing of the secured debt on the Motor Coaches and an amount necessary to exercise a purchase option on 20 coaches which is approximately \$10,700,000.
- e. The highest Over Bid submitted by a Qualified Bidder shall be the initial over-bid at the Auction ("**Initial Over-Bid**"). **Subsequent over-bids ("**Subsequent Over-Bids**") shall be in increments of not less than \$75,000 higher than the immediately preceding bid.** The Initial Over-Bid and Subsequent Over-Bids shall be on substantially the same or better terms and conditions, taken as a whole, as those set forth in the Stalking Horse Bid. In determining the amount of any Subsequent Over-Bid submitted by the Stalking Horse Bidder, Seller Entities shall take into account, and the Stalking Horse Bidder shall be entitled to a credit equal to, the amount of the Break-Up Fee.
- f. All bids shall be made in the presence of other bidders. Seller Entities and Qualified Bidders shall have the right to request reasonable breaks during the pendency of the Auction, with which reasonable requests the Seller Entities shall comply.
- g. Upon the conclusion of the bidding, Seller Entities shall announce their determination as to which bidder has submitted the highest and best bid ("**Successful Bid**"), and such bidder shall be declared the successful bidder ("**Successful Bidder**"). The Successful Bid, as determined by Seller Entities in accordance with these Bidding Procedures, shall be submitted to the Bankruptcy Court for approval at the Sale Hearing. Within two (2) business days of the declaration of the Successful Bidder, the deposits of all unsuccessful bidders shall be refunded with any accrued interest, except as to any bidders ("**Back-up Bidders**") which wish their last bid to remain in consideration as a back-up to the Successful Bid ("**Back-up Bids**"). Any party wishing to have its last bid considered as a Back-up Bid shall provide the Seller Entities with a written request for such treatment no later than one (1) business day of Seller Entities' declaration of the Successful Bidder.
- h. The transaction evidenced by the Successful Bid shall close not later than 30 days following the entry of the Sale Order ("**Outside Closing Date**") at which time the Successful Bidder shall pay the Successful Bid amount less the amount of the deposit to the Seller Entities on the Closing Date into the Escrow Account; provided,

1 however, if the Stalking Horse Bidder is declared the Successful Bidder such date  
2 may be extended pursuant to the terms of the APA executed by the Stalking Horse  
3 Bidder.

4 i. The Successful Bidder shall, at its expense, obtain all necessary governmental  
5 licenses, permits and approvals necessary to the consummation of its proposed  
6 transaction (provided, however, that this provision does not change any provision of  
7 the APA or any bid regarding allocation of responsibility to pay taxes of Seller  
8 Entities).

9 j. In the event Purchaser is not the Successful Bidder and Seller consummate an  
10 Alternative Transaction (not including as a result of the due diligence condition being  
11 unsatisfied under Section 8.3 of the APA), Purchaser shall be entitled to receive from  
12 Seller' bankruptcy estate upon the consummation of such Alternative Transaction a  
13 cash break-up fee payment in the amount of up to \$300,000 of Purchaser's  
14 reasonable and actual expenses incurred in connection with the proposed transactions  
15 contemplated by the APA (the "**Break-Up Fee**") as approved by order of the  
16 Bankruptcy Court. The Break-Up Fee shall be paid at the closing of the Alternative  
17 Transaction and shall be paid concurrently or ahead of any other distributions or  
18 payments to any Seller Entities contemplated in connection with such Alternative  
19 Transaction by the Successful Bidder. The Break-Up Fee shall constitute an  
20 administrative expense of Seller Entities under Sections 503(b) and 507(a)(1) of the  
21 Bankruptcy Code. If Purchaser is the Successful Bidder and Purchaser breaches its  
22 obligations under the APA without having its performance excused under the terms  
23 of the APA, it shall not be entitled to receive the Break-Up Fee if a sale of some or all  
24 of the Acquired Assets is closed with another party.

25 k. In the event a bidder is declared to be the Successful Bidder and such bidder fails to  
26 timely perform any of its obligations as set forth above or pursuant to the Bankruptcy  
27 Court approved definitive agreements, such declared Successful Bidder shall forfeit  
28 all deposits made to the extent provided in such definitive agreements or for failure to  
enter into such definitive agreement if a bidder other than the Purchaser without  
regard to Seller Entities' ultimate damages occasioned by such failure; such deposits  
shall not constitute liquidated damages; and, notwithstanding the foregoing, Seller  
Entities and the bankruptcy estates shall retain all rights, remedies, claims,  
counterclaims, and defenses, including the right to seek equitable or injunctive relief.  
In such an event the Seller Entities shall be free to treat the next highest and best bid  
received as the Successful Bid without further Court approval.

1. In the event that the Successful Bidder fails to close the transaction for any reason,  
Seller Entities shall announce their determination as to which Back-up Bidder has  
submitted the highest and best back-up Bid ("**Successful Back-up Bid**"). The party  
making the Successful Back-up Bid shall then be deemed the Successful Bidder and

1 shall close the transaction not later than 30 days following the determination of the  
2 Successful Back-up Bid.

- 3 m. Seller Entities shall give not less than twenty-four (24) days written notice to all  
4 parties in interest in the Berg Case and their respective bankruptcy cases, including all  
5 Persons which have asserted liens on or security interests in any of the Acquired  
6 Assets, all non-debtor parties to the Assumed Executory Contracts and all known  
7 prospective bidders of the date, time and location of the Sale Hearing, unless the  
8 Bankruptcy Court enters an order allowing the Sale Hearing to proceed on less  
9 notice.
- 10 n. In the event Seller Entities are unable to obtain Court approval of the Sale Motion,  
11 the sole remedy of any bidder shall be of the return of its deposit except, with respect  
12 to Purchaser, as otherwise provided in the APA with respect to the Break-Up Fee.
- 13 o. All bids shall be all cash as to amounts payable for the Acquired Assets exclusive of  
14 any amounts designated for the Earn-Out or post-closing investment by any  
15 Successful Bidder.

16 The proposed Bidding Procedures are in the best interests of Debtors, their creditors, and  
17 their estates. The Bidding Procedures are designed to strike a balance between inviting competing  
18 bids and enabling Debtors to close a sale with Purchaser within a reasonable time frame. The  
19 Bidding Procedures thus are fair, reasonable and necessary to promote the highest and best sale  
20 price, without imposing undue obstacles to the competitive bid process. Moreover, debtors often  
21 employ bidding protections in order to encourage the making of an original offer subject to higher  
22 and/or better offers and ultimately to increase value for the estate.

23 Here, the Break-Up Fee is an integral part of Purchaser's offer. In fact, Purchaser's offer to  
24 purchase the Acquired Assets was – and remains – predicated and conditioned upon, inter alia, this  
25 Court's approval of the Break-Up Fee. As such, the assurance of the Break-Up Fee has "promoted  
26 more competitive bidding" because it induced a bid from Purchaser, which is higher and better than  
27 any other bids received by the Debtors, that otherwise might not have been made. Debtors submit  
28 that Purchaser should be reasonably reimbursed for its willingness to assume the role of the "stalking

1 horse” as all parties willing to serve in such role are also requesting break-up fees of similar  
2 magnitude. Moreover, Purchaser’s offer (including the Break-Up Fee) is also likely to serve as a  
3 catalyst to higher bids. Accordingly, Debtors respectfully submit that this Court should authorize  
4 and approve the Bidding Procedures, including the Break-Up Fee.  
5

#### 6 **IV. LEGAL ANALYSIS**

##### 7 **(a) Conducting a Public Auction Pursuant to the Bidding Procedures Is in the Best** 8 **Interests of the Estate and Its Creditors**

9 By this Motion, Debtors seek approval of the Proposed Asset Sale, free and clear of liens  
10 and encumbrances, as further detailed above and in the APA, subject to higher or better offers.  
11

12 (i) **Bankruptcy Code § 363.** Section 363(b) of the Bankruptcy Code authorizes  
13 a debtor to sell its assets outside of the ordinary course of business. A debtor must show that each  
14 of the following elements has been met: (i) a sound business reason exists for the proposed  
15 transaction; (ii) the sale has been proposed in good faith; (iii) the sale price is fair and reasonable;  
16 and (iv) accurate and reasonable notice has been provided of the transaction.<sup>4</sup> Here, the proposed  
17 sale of the Acquired Assets pursuant to the APA meets each of these four factors.  
18

19 (ii) **The Proposed Sale Is Supported by Sound Business Reasons.** Based  
20 upon their analysis of their existing and future business prospects, the Debtors have concluded that,  
21 given their current situation and the absence of a source of capital for investing in long-term  
22 operations, the Proposed Asset Sale represents the only viable way to maximize the value of  
23 Debtors’ estates for the benefit of all creditors.  
24

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26  
27 <sup>4</sup> *In re Country Manor of Kenton, Inc.*, 172 B.R. 217, 220-21 (Bankr. N.D. Ohio 1994); *In re Stroud*  
28 *Ford, Inc.*, 163 B.R. 730 (Bankr. M.D. Pa. 1993); *In re Plabell Rubber Prods., Inc.*, 149 B.R. 475, 479 (Bankr.  
N.D. Ohio 1992); *In re George Walsh Chevrolet, Inc.*, 118 B.R. 99, 102 (Bankr. E.D. Mo. 1990).

1       The paramount goal in any proposed sale of property of the estate is to maximize the  
2 proceeds received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc.*, 107 F.3d 558,  
3 564-65 (8th Cir. 1997) (stating that, in bankruptcy sales, “a primary objective of the Code [is] to  
4 enhance the value of the estate at hand”); *In re Integrated Res., Inc.*, 147 B.R. 650, 659 (S.D.N.Y.  
5 1992) (“It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and  
6 the Debtors’ duty with respect to such sales is to obtain the highest price or greatest overall benefit  
7 possible for the estate.”). To that end, courts uniformly recognize that procedures intended to  
8 enhance competitive bidding are consistent with the goal of maximizing the value received by the  
9 estate and are appropriate in the context of bankruptcy sales. *See In re Integrated Res., Inc.*, 147  
10 B.R. at 659 (sales procedures should “encourage bidding and maximize the value of the Debtors’  
11 assets”).

12  
13  
14  
15       Here, the proposed Bidding Procedures will allow and encourage interested parties to submit  
16 competing bids in an Auction, thereby maximizing the value that the Debtors will receive for their  
17 assets. The Debtors believe that the Auction process will allow them to determine the highest and  
18 best price possible for their assets. Without a prompt sale, the value of the Debtors as a going  
19 concern will significantly diminish because of the Debtors’ cash flow difficulties.

20  
21       The Debtors further submit that the Proposed Asset Sale will preserve the substantial  
22 goodwill of MTR Western entities’ business, maintain valuable relationships with their customers,  
23 preserve jobs, and avoid a liquidation sale of Debtors’ assets at severely depressed, “fire-sale” prices.  
24 Thus, Debtors believe that the Proposed Asset Sale will realize the most cash possible for Debtors’  
25 estate and creditors.

1           **(iii) The Sale has Been Proposed in Good Faith.** “The requirement that a Purchaser  
2 act in good faith ... speaks to the integrity of his conduct in the course of the sale proceedings.” *In*  
3 *re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). “Typically, the  
4 misconduct that would destroy a Purchaser’s good faith status at a judicial sale involves fraud,  
5 collusion between the Purchaser and other bidders or the trustee, or an attempt to take grossly unfair  
6 advantage of other bidders.” *Id.*

7  
8           Here, the APA is the result of protracted, arm’s length negotiations between Debtors and  
9 Purchaser, and their respective advisors. Purchaser thus is a good faith Purchaser within the  
10 meaning of Section 363(m) of the Bankruptcy Code and should be entitled to all of the protections  
11 thereof.  
12

13           Additionally, the sale of the Acquired Assets is subject to higher or better offers and Debtors  
14 intend to provide notice of the Proposed Asset Sale to all potential bidders as more fully discussed  
15 below. Finally, Debtors have fully disclosed, and are requesting herein the Court’s approval of, all  
16 of the terms and conditions of the Proposed Asset Sale, notice and bidding procedures.  
17 Accordingly, the sale of the Acquired Assets has been proposed, and is, in good faith.  
18  
19

20           **(iv) The Purchase Price is Fair and Reasonable.** Since the appointment of the Trustee  
21 for the Berg Case, and her control of the MTR Western entities, she and her advisors have sought  
22 higher or better offers for the MTR Western entities’ assets. Based upon those efforts, Debtors  
23 believe that the Purchase Price is fair and reasonable, is the highest and best offer received to date  
24 for the Acquired Assets, and that the likely alternative to the Proposed Asset Sale is a forced  
25 liquidation, with a resultant loss of substantial value to the Debtors’ estates.  
26  
27  
28

1 Further, the Debtors submit that the payment of the Break-Up Fee in the event of an  
2 Alternative Transaction is fair and reasonable. Purchaser has incurred and will continue to incur  
3 costs in continuing to make its offer available to Debtors. If another bidder appears and pays  
4 substantially more than Purchaser's offer, the Debtors will reap the benefits of Purchaser's first offer  
5 allowing for a higher subsequent offer. Indeed, courts have recognized that such fees are often a key  
6 component to significant sales conducted under section 363 of the Bankruptcy Code. *See In re*  
7 *Integrated Res., Inc.*, 147 B.R. at 659-60 ("Break-up fees are important tools to encourage bidding  
8 and to maximize the value of the debtor's assets ... In fact, because the ... corporation ha[s] a duty  
9 to encourage bidding, break-up fees can be necessary to discharge [such] duties to maximize  
10 values."). Here, the Break-Up Fee reasonably relates to Purchaser's "risk, effort and expenses ...",  
11 *In re Integrated Res., Inc.*, 147 B.R. at 662, was the result of arms-length negotiations, *In re 955 5<sup>th</sup>*  
12 *Avenue Associates*, 96 B.R. 24 (Bankr. S.D.N.Y. 1989) and encourages bidding. *Id.* at 28. Thus,  
13 the Break-Up Fee should be approved and allowed in the event of an Alternative Transaction.  
14  
15  
16

17 (v) **The Requirements of 11 U.S.C. § 363(f).** Section 363(f) of the Bankruptcy Code  
18 provides:  
19

20 (f) The Trustee may sell property under subsection (b) or (c) of this section free and  
21 clear of any interest in such property of an entity other than the estate, only if –

- 22 (1) applicable non-bankruptcy law permits sale of such property free and clear of  
23 such interest;
- 24 (2) such entity consents;
- 25 (3) such interest is a lien and the price at which such property is to be sold is  
26 greater than the aggregate value of all liens on such property;
- 27 (4) such interest is in bona fide dispute; or
- 28 (5) such entity could be compelled, in a legal or equitable proceeding, to accept a  
money satisfaction of such interest.

1 11 U.S.C. § 363(f).

2 First, the Claims Bar Date set for filing proofs of claim in this case has not been set, and as of  
3 this date no secured claims for any of the MTR Western Entities have been filed (the total filed  
4 unsecured claims amount to under \$40,000). It is currently contemplated that all approved secured  
5 claims will be paid in full out of proceeds from the Proposed Asset Sale. To the extent that there are  
6 additional claims or amounts due and secured by the Acquired Assets, any liens on such assets shall  
7 also attach to the proceeds from the Proposed Asset Sale.  
8

9  
10 Thus, the Debtors submit that the transfer of the Acquired Assets free and clear of any liens,  
11 claims, interests, and encumbrances satisfies the statutory prerequisites of Section 363(f) of the  
12 Bankruptcy Code. Accordingly, Debtors seek the entry of a Sale Order authorizing the sale of the  
13 Acquired Assets pursuant to Section 363.  
14

15 (b) **Assumption and Assignment Contracts and Leases Pursuant to 11 U.S.C. § 365**

16 Section 365(a) of the Bankruptcy Code governs assumption of unexpired leases and other  
17 executory contracts and provides that, “[t]he trustee, subject to the court’s approval, may assume or  
18 reject any executory contracts or unexpired lease of Debtor.”  
19

20 **Section 365(f) of the Bankruptcy Code provides, in pertinent part, that:**

- 21 (2) The trustee may assign an executory contract or unexpired lease of the debtor  
22 only if –  
23 (A) the trustee assumes such contract or lease in accordance with the  
24 provisions of this section; and  
25 (B) adequate assurance of future performance by the assignee of such  
26 contract or lease is provided, whether or not there has been a default in such a  
27 contract or lease.

28 11 U.S.C. § 365(f)(2).

1 The Debtors' proposed assumption and assignment of the Assumed Executory Contracts (to  
2 be designated by Purchaser and separately noted for hearing) is a proper exercise of Debtors'  
3 business judgment as part of an integral component of this negotiated Proposed Asset Sale.  
4 Moreover the contracts to be assumed will avoid rejection damages that would likely dilute amounts  
5 to ultimately go to the class of unsecured creditors. Additionally, Purchaser has represented that it is  
6 a competent, financially stable assignee. Therefore, it is respectfully submitted that Debtors may  
7 assume and assign the Assumed Executory Contracts under Section 365 of the Bankruptcy Code.  
8 Debtors plan to bring a separate motion to assume and reject contracts which shall be conditioned  
9 upon closing of the Proposed Asset Sale, and such motion shall include disclosure of the specific  
10 executory contracts to be assumed.  
11

12  
13 **(c) The Successful Bidder Is Entitled to Good Faith Purchaser Status Pursuant to Section**  
14 **363(m) of the Bankruptcy Code.**

15 The Debtors request that the Court find that the Successful Bidder is qualified to acquire the  
16 Acquired Assets and will do so in good faith within the meaning of Bankruptcy Code section  
17 363(m). Specifically, section 363(m) provides that "[t]he reversal or modification on appeal of an  
18 authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect  
19 the validity of a sale or lease under such authorization to an entity that purchased or leased such  
20 property in good faith ...." 11 U.S.C. § 363(m). Thus, pursuant to this section, "an appeal of a  
21 bankruptcy court's ruling on a foreclosure action [or sale] generally cannot affect the rights of a  
22 good faith purchaser of the foreclosed property." *Mann v. Alexander Dawson, Inc.*, 907 F.2d 923,  
23 926 (9th Cir. 1990).

24 Here, Purchaser needs assurance that the purchase of the Acquired Assets will not be subject  
25 to future attack by objecting creditors, if any. Such assurance, Debtors believe, is required to  
26  
27  
28

1 generate the maximum purchase price for such assets at the Sale Hearing. Further, these  
2 circumstances warrant a finding of good faith on the part of Purchaser. Lack of good faith is  
3 generally determined by the existence of fraudulent conduct or insider dealing during the sale  
4 process. *See In re Exennium, Inc.*, 715 F.2d 1401 (9th Cir. 1983). Here, no such fraudulent  
5 conduct or dealings have occurred as of the date of this Sale Motion and will not occur prior to the  
6 Sale Hearing. Further, the Proposed Asset Sale here will be the product of an open Auction subject  
7 to approval of the Court and to the extent necessary, arms-length, good faith negotiations between  
8 the Debtors, on the one hand, and the Successful Bidder, on the other.

#### 11 **V. PROPOSED NOTICE OF PROPOSED ASSET SALE AND PROCEDURES**

12 In order to assure broad dissemination of notice of the Proposed Asset Sale, the Sale  
13 Hearing, and the Bidding Procedures, upon entry of the Bidding Procedures Order, Debtors propose  
14 to serve (a) the Bidding Procedures Order and the proposed notice of sale (“*Notice of Sale*”)  
15 attached hereto as Exhibit B on all creditors, equity holders and prospective bidders (or their  
16 counsel) that are known to the Debtors and their advisors and (b) the Notice of Sale and the Sale  
17 Motion on (i) the Office of the United States Trustee; (ii) counsel to the Official Committee of  
18 Unsecured Creditors (if any); (iii) the local, state and federal taxing authorities for each jurisdiction  
19 in which the Acquired Assets are located; (iv) counsel to the Purchaser; (v) all parties known to the  
20 Debtors to have or to assert any lien, claim, Encumbrance or other interest in any of the Acquired  
21 Assets; (vi) the Office of the United States Attorney; (vii) the Attorney General for the State of  
22 Washington; and (viii) all persons who have filed requests for notice in these chapter 11 cases.

26 The Debtors respectfully submit that such notice of the sale of the Acquired Assets satisfies  
27 the notice requirements of the applicable Bankruptcy Rules and § 363(b) of the Bankruptcy Code,  
28

1 constitutes good and sufficient notice, and that no other or further notice of this Motion, the  
2 Proposed Asset Sale, and the APA is required.

3  
4 **VI. CONCLUSION**

5 Based on the foregoing, the Debtors respectfully request that this Court (i) at the conclusion  
6 of the initial hearing on the Sale Motion, (a) enter the Bidding Procedures Order substantially in the  
7 form filed concurrently herewith, and (b) approve the forms of the Sale/Bidding Procedures and the  
8 Notice of Sale attached as exhibits to the Bidding Procedures Order; (ii) at the conclusion of the  
9 Sale Hearing, enter the Sale Order substantially in the form attached hereto as Exhibit A; and (iii)  
10 grant such additional relief as requested herein.  
11

12 DATED this 2<sup>nd</sup> day of December, 2010.

13 KARR TUTTLE CAMPBELL  
14

15  
16 By: /s/ George S. Treperinas  
17 George S. Treperinas, WSBA #15434  
18 Stephen S. McKay, WSBA #42046  
19 Attorneys for Debtors-in-Possession  
20 MTR Western Entities  
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